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December 9, 2008

Jeff S. Jordan, Esquire
Office of the General Counsel
Federal Election Commission
999 E. Street, N.W.
Washington, DC 20463

Re: MUR 6131
(Public Television 19, Inc.)

Dear Mr. Jordan:

By counsel, Public Television 19, Inc., licensee of noncommercial, educational television station KCPT(TV), Kansas City, Missouri ("KCPT"), hereby responds to the complaint filed by Mr. David Browning, former candidate for the United States House of Representatives (the "Complaint"), in the above-captioned proceeding (this "Response"). KCPT, through its designated agent for service of process, received your letter of November 20, 2008 on November 24, 2009. Thus, this Response is timely filed.¹

The Complaint alleges that KCPT's October 10, 2008 "Kansas City Week in Review" news program interview of a single federal candidate constitutes an illegal corporate contribution, urging the Federal Election Commission to impose a fine measured in "a multiple of \$100,000.00."² However, as demonstrated in this Response:

- (A) KCPT complied fully with the Federal Election Campaign Act of 1971, as amended (the "Act") and Sections 110.13 and 114.4(f) of the Commission's rules when preparing for a candidate debate that KCPT ultimately never staged; and,
- (B) The "press exemption" established by Section 431(9)(B)(i) of the Act and Sections 100.73 and 100.132 of the Commission's rules protects the communication at issue in the Complaint from government sanction.

Accordingly, no action should be taken against KCPT in this matter.

¹ 11 C.F.R. §§ 111.2, 111.6.

² Complaint at paragraph 19.

ARGUMENT

A. KCPT Complied with the Act and the Commission's Candidate Debate Rules When Preparing for a Candidate Debate That It Ultimately Did Not Stage

KCPT denies the Complaint's allegations and sets forth below the facts that demonstrate KCPT's compliance with the Act and the Commission's rules. The Complaint alleges that KCPT violated the Commission's candidate debate rules by (1) not using "pre-existing, pre-established criteria" [sic] and (2) designing a debate to "promote some candidates over others" through the facilities of KCPT(TV) on October 10, 2008.³ The Complaint also implies, but does not assert explicitly, that (3) KCPT excluded Mr. Browning improperly from participating in a candidate debate.⁴ The Complaint attempts to value these alleged violations as an "inkind contribution of between \$140,000 and \$200,000."⁵

Section 114.4(f)(2) of the Commission's rules permits a broadcaster to use its own funds to defray costs incurred in staging public candidate debates that are held in accordance with Section 110.13 of the Commission's rules.⁶ This latter provision qualifies non-profit corporations and broadcasters that are not owned or controlled by a political party, political committee, or candidate to stage candidate debates.⁷ While the Complaint does not question KCPT's staging organization eligibility, KCPT hereby enters the following facts into the record:

- The Federal Communications Commission (the "FCC") licenses KCPT to operate KCPT(TV), a noncommercial educational television station in Kansas City, Missouri (FCC Facility ID No. 53843).⁸
- KCPT is incorporated as a Missouri nonprofit corporation and is qualified by the Internal Revenue Service as a public charity, pursuant to Section 501(c)(3) of the Internal Revenue Code.

³ Complaint at paragraphs 4 – 6, 11. KCPT originally planned to stage a candidate debate in the 2008 Missouri Sixth Congressional District race on October 17, 2008, before terminating those plans in response to the intervening events described below. Declaration of Nick Haines. The communication subject to this Complaint aired one week earlier than the originally planned October 17, 2008 debate, on October 10, 2008. *Id.*

⁴ See Complaint at paragraph 13.

⁵ See Complaint at paragraph 19 (failing to cite statutory authority). In addition to other substantive faults, the Complaint fails to support its claims that the cost of advertising in the "Kansas City market runs between \$7,000 and \$10,000 per minute," *id.* at 18, that the communication at issue "exceeded 20 minutes," *id.* at 19, and the implied conclusion that KCPT(TV) airtime has a market value. As documented in this Response, KCPT(TV) is a 501(c)(3) public charity, a licensed noncommercial educational broadcast station, and a PBS member. Pursuant to the Communications Act of 1934, as amended, 47 U.S.C. § 399B, and the regulations of the Federal Communications Commission, 47 C.F.R. § 73.621, public broadcast stations may not air commercial, political, or issue advertisements or even generally sell airtime. As a result, the "usual and normal charge for goods," as defined by Section 100.52(d)(2) of the Commission's rules, the price of KCPT(TV) primetime programming in Kansas City, Missouri on October 10, 2008, is effectively zero because these goods are not salable at any price by KCPT in the market.

⁶ 11 C.F.R. 114.4(f)(2).

⁷ 11 C.F.R. 110.13(a).

⁸ Federal Communications Commission, *Station Search Details*, CDBS database, attached hereto as Exhibit A.

- No political party, political committee, or candidate owns or controls KCPT or its broadcast facilities.⁹

Eligible staging organizations are free to structure debates as they see fit, so long as each debate includes at least two candidates and staging organizations do not structure debates to promote or advance one candidate over another.¹⁰ When selecting candidates to participate in a debate, staging organizations must use pre-established, objective criteria.¹¹ Nomination by a particular political party may not be the sole selection criterion for candidates in a general election debate.¹²

KCPT met and exceeded these requirements. Most relevant to the Complaint's allegations is the core fact that KCPT prepared for, yet never broadcast, the debate at issue. Section A(3) of this Response details KCPT's decision to terminate its debate planning and broadcast, instead, an interview with candidate Kay Barnes during news programming. The following discussion demonstrates KCPT's compliance with the Commission's candidate debate rules during the course of the station's debate preparation, when those rules governed KCPT's then-contemplated broadcast and related off-air operations.

1. KCPT Used Pre-Existing, Objective Candidate Selection Criteria

Contrary to the Complaint's allegations, KCPT had and used objective candidate selection criteria *before* selecting candidates to participate in its contemplated 2008 Missouri Sixth Congressional District general election debate. The station is a Public Broadcasting Service ("PBS") member. KCPT, in consultation with PBS stations from across the country and the PBS Best Practices in Journalism Unit, developed these written, objective candidate debate selection criteria in September 2000. A copy of this policy and its criteria is attached hereto as page 3 of Exhibit B. Thus, KCPT's candidate selection criteria satisfy the "pre-existing" requirement.

KCPT's candidate selection criteria also satisfy the Commission's "objective" requirement. The Commission's official candidate debate guidance recognizes that "objective criteria may be set to control the number of candidates participating in a debate."¹³ When interpreting the United States Supreme Court's validation of another public television station's rightful exclusion of a candidate with little public support, the Office of the General Counsel concluded,

[I]n the context of staging debates, "objective" selection criteria are not required to be stripped of all subjectivity or to be judged only in terms of tangible, arithmetical cut-offs. Rather, it appears that they must be free of "content bias,"

⁹ Declaration of Susan Stanton.

¹⁰ 11 C.F.R. 110.13(b).

¹¹ 11 C.F.R. 110.13(c).

¹² 11 C.F.R. 110.13(c).

¹³ Corporate and Labor Organization Activity; Express Advocacy and Coordination With Candidates; Final Rule, 60 Fed. Reg. 64,262 (Dec. 14, 1995) ("Debate E&J").

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and not geared to the selection of "certain pre-chosen participants." Thus, criteria based on significant personal and campaign organization presence, as opposed to policies or platforms, appear to be "objective" criteria permissible under the statute and regulations.¹⁴

The Office of General Counsel's conclusion, as adopted unanimously by the Commission in finding no reason to believe the respondents in that proceeding had violated the Act or the Commission's candidate debate rules,¹⁵ establishes the essential threshold for "objective" criteria: they must be viewpoint-neutral.

Neither the Act, the Commission's rules, nor the Commission's official guidance prescribe specific elements that "objective" criteria must incorporate, although the Commission's guidance observes that "reasonableness" is implied by the text of the rule.¹⁶ This guidance prohibits discriminatory criteria (*i.e.*, those based on race, creed, color, religion, sex, or national origin), criteria designed to select certain pre-chosen participants, and use of major party nomination as the sole selection criterion in general election debates.¹⁷ The Commission advises, but does not require, staging organizations to "reduce their objective criteria to writing and to make the criteria available to all candidates before the debate."¹⁸ KCPT's long-established criteria exceed all of these standards, thus satisfying the "objective" requirement.

The attached "KCPT Debate Policy" explains KCPT's goals and specifies the criteria it uses when selecting candidates to participate in debates that it stages.¹⁹ Its criteria are even more objective than less quantifiable factors the Commission has found acceptable in prior proceedings.²⁰ KCPT's first criterion qualifies candidates who can demonstrate public support of seven percent or more in one independently conducted opinion poll. This numeric threshold is easily quantified and is less than one-half of the 15 percent polling threshold required by the Commission on Presidential Debates. The KCPT Debate Policy waives this polling requirement for candidates in races where independent public opinion polling does not exist. If a candidate has met this threshold, to be eligible for participation, he or she must also meet three of the following five criteria:

- a) file campaign finance report detailing contributions from 20 individuals unrelated to the candidate or candidate's family.
- b) Candidate website detailing biography and issues.

¹⁴ Federal Election Commission, *First General Counsel's Report*, MURs 4956, 4962 and 4963, at 23 (Oct. 25, 2000) (quoting *Arkansas Educational Television Com'n v. Forbes*, 523 US 666, 683 (1998)).

¹⁵ Federal Election Commission, *Statement of Reasons of Commissioner David M. Mason*, MURs 4956, 4962 and 4963 (Feb. 13, 2001).

¹⁶ Debate E&J at 64,262.

¹⁷ Debate E&J at 64,262.

¹⁸ Debate E&J at 64,262.

¹⁹ Exhibit B at page 3.

²⁰ See, e.g., Federal Election Commission, *First General Counsel's Report*, MURs 4956, 4962 and 4963, at 18 – 22 (Oct. 25, 2000) (citing the Commission's unanimous Feb. 24, 1998 decision in MURs 4451 and 4473).

- c) Minimum of 25-yard signs promoting candidacy in 25 different locations in area that candidate would serve.
- d) Demonstrate participation in other candidate forums, not just televised debates.
- e) Demonstrate community engagement by hosting 12 campaign related events, news conferences or neighborhood association meetings.²¹

At the time KCPT used these criteria to determine which candidates were eligible to participate in the contemplated debate, only Representative Sam Graves (R) and his challenger, Ms. Barnes (D) met the threshold eligibility criterion of garnering at least seven percent in independent public opinion polling. Both also satisfied the second requirement by meeting at least three of five additional criteria. KCPT therefore invited only these two candidates to participate in the contemplated KCPT(TV) debate.

KCPT analyzed Mr. Browning's eligibility under these pre-established, objective criteria. Mr. Browning did not meet the polling criterion (i.e., satisfying the seven percent floor) in polls KCPT reviewed, nor did Mr. Browning contest KCPT's analysis or provide evidence to support his eligibility. For example, May 19 and August 1, 2008 Missouri Sixth Congressional District SurveyUSA polls reported no discernible public support for Mr. Browning. On September 19, 2008, well after KCPT had terminated its plans to stage the contemplated debate, another poll reported just four percent support for Mr. Browning.²² KCPT was therefore justified, pursuant to the Commission's rules and its policy, in not inviting Mr. Browning because he could not meet the reasonable, numeric threshold polling criterion. Thus, KCPT met the "use" requirement.

KCPT's criteria and the station's formal policy existed years before this use. They are viewpoint-neutral. They do not consider race, creed, color, religion, sex, or national origin. They are not designed to select certain pre-determined candidates, as shown on their face, much less by the nearly eight-year period in-between their creation and use in preparing to stage the debate at issue. KCPT's debate selection criteria do not consider a candidate's party affiliation nor do they rely on the subjective judgment of station personnel. KCPT has followed the Commission's recommendation to reduce its selection criteria to writing and to make these criteria available to candidates before each debate. Consequently, KCPT's debate selection criteria comply fully with the Act and the Commission's rules.

²¹ Exhibit B at page 3.

²² Exhibit C.

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2. **The Complaint Fails to Support Its Allegation of Structuring a Debate Improperly to Promote One Candidate Over Another**

The Complaint's allegation, "That the aforesaid corporation violated the rules of the commission [sic] by holding a debate designed to promote some candidates over others, 11 CFR 110.13(b),"²³ provides no factual basis on which to respond in detail. It appears that Mr. Browning has confused the requirement cited in this allegation, which regulates the *format* of a debate, with the selection requirement discussed above. Whether KCPT structured a debate to promote one candidate over another by, for example, implementing one candidate's preference for Lincoln-Douglas format over the other's Town Meeting preference, providing candidates with different-sized podia, permitting certain candidates more time to respond, or engaging in any other structural manipulation is irrelevant because KCPT never actually held, staged, or broadcast the debate it originally planned.

3. **KCPT Neither Excluded Mr. Browning Improperly Nor Staged the Debate it Originally Planned to Stage and Broadcast**

It is true that, when Nick Haines, KCPT(TV) Executive Producer Public Affairs/News, examined the candidates for the 2008 general election to the United States House of Representatives from the Sixth Missouri Congressional District under the station's selection criteria, KCPT invited only Representative Graves and Ms. Barnes to attend. It is not true that KCPT excluded Mr. Browning in contravention of the Act or the Commission's rules. Representative Graves and Ms. Barnes satisfied KCPT's pre-established, objective selection criteria; Mr. Browning did not.²⁴

In late July 2008, Mr. Browning called KCPT and spoke with Susan Stanton, KCPT Interim CEO and President, requesting inclusion in the anticipated October 17 debate. At this point in time, KCPT had not yet determined whether it would proceed with or cancel the contemplated debate. Ms. Stanton related this fact to Mr. Browning during their conversation.²⁵ The Complaint, at paragraph 6, corroborates this fact by relating the content of Mr. Browning's telephone conversation with Ms. Stanton: "Complainant was told that no debate was scheduled or approved." Ms. Stanton forwarded Mr. Browning's request and contact information to Mr. Haines.²⁶

On July 29, 2008, Mr. Haines called the telephone number provided by Mr. Browning and left a voicemail message, reiterating to Mr. Browning that KCPT had not yet decided whether it would proceed with the debate because the incumbent candidate had not responded to KCPT's overtures, offering as well to send Mr. Browning a copy of the KCPT(TV) Debate Policy.²⁷ Mr. Haines reviewed Mr. Browning's public opinion poll support levels, campaign

²³ Complaint at paragraph 4.

²⁴ Declaration of Nick Haines; Exhibit C.

²⁵ Declaration of Susan Stanton. The facts surrounding this conversation are consistent with the second, third, and fourth sentences of the Complaint's paragraph 6.

²⁶ Declaration of Susan Stanton.

²⁷ Declaration of Nick Haines.

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finance disclosure report contents, campaign website, and other factors relevant to the station's longstanding candidate debate selection criteria. He found that the Browning campaign appeared to meet only one of these criteria, the publication of a campaign website, and failed to meet the prerequisite polling requirement.²⁸ A copy of the letter Mr. Haines sent to Mr. Browning on August 18, 2008 to describe and provide KCPT's candidate debate selection criteria is attached hereto as Exhibit B. Mr. Browning never responded to these communications by KCPT or otherwise asserted his satisfaction of the KCPT debate criteria provided in the letter,²⁹ suggesting that KCPT evaluated his selection eligibility accurately.

Days after KCPT provided Mr. Browning with a copy of its selection criteria, on August 25, 2008, the Graves for Congress Campaign Manager notified KCPT that Representative Graves would not participate in the anticipated KCPT(TV) candidate debate.³⁰ KCPT then determined, in its sole editorial judgment, that proceeding with the contemplated debate without the incumbent would not serve the public interest or KCPT(TV) viewers' needs.³¹ KCPT, accordingly, terminated its plans to stage a candidate debate and was, thereafter, no longer subject to the Commission's staging organization eligibility, debate structure, or candidate selection requirements. As demonstrated in this Section of the Response, KCPT complied fully with the Act and the Commission's candidate debate rules while it prepared to stage the October 17 debate; those requirements no longer governed KCPT's operations after the station terminated its debate plans.

B. The Press Exemption Shields KCPT's October 10, 2008 Kay Barnes Interview

Beyond the Complaint's failure to support its allegations of candidate debate violations, or even the existence of a debate, this Response demonstrates that the program KCPT actually produced and aired containing the appearance of Ms. Barnes enjoys First Amendment protection under the "press exemption." The facts of Ms. Barnes' October 10, 2008 appearance on the regularly-scheduled KCPT(TV) "Kansas City Week in Review" news broadcast (the "Kay Barnes Interview") demonstrate that KCPT did not violate the Act or the Commission's rules.

1) Press Exemption Legal Standard

The Act prohibits corporations from making any contribution or expenditure in connection with any federal election.³² Yet the Act and the Commission's rules exclude from the definitions of "contribution" and "expenditure" the cost of any news story, commentary, or editorial distributed through the facilities of a broadcast station that is not owned or controlled by any political party, political committee, or candidate.³³ Consequently, money spent by an independent corporation to distribute any news story, commentary, or editorial through its

²⁸ Declaration of Nick Haines.

²⁹ Declaration of Nick Haines.

³⁰ Declaration of Nick Haines.

³¹ Declaration of Nick Haines; Declaration of Susan Stanton.

³² 2 U.S.C. § 441b(a).

³³ 2 U.S.C. § 431(9)(B)(i); 11 C.F.R. §§ 100.73, 100.132.

broadcast station's facilities does not violate Section 441b(a) of the Act or the Commission's rules.

When investigating a complaint that alleges a violation of the Act by a press entity, the Commission must follow a two-step process.³⁴ The Commission must show that the press exemption is not applicable to the press entity before investigating the substance of the complaint.³⁵ This first stage of this process explores whether the press entity (1) "is owned by the political party or candidate" and, (2) "was acting as a press entity in making the distribution complained of."³⁶ Only if the Commission finds such ownership or action inconsistent with the press entity's legitimate press function may the Commission even proceed to investigate the substance of the complaint.³⁷

2) KCPT Is Independent and Acted Within Its Legitimate Press Function When Broadcasting The Kay Barnes Interview

Here, the Commission must find that the press exemption applies to KCPT with respect to the "distribution complained of," the Kay Barnes Interview. No political party, political committee, or candidate owns or controls KCPT or its broadcast facilities. The FCC licenses KCPT to operate the broadcast facilities of KCPT(TV), the PBS broadcast television station that aired the program. The station has produced "Kansas City Week in Review" to examine critical public policy issues with newsmakers and journalists since October 2, 1992, broadcasting this weekly program in the Friday at 7:30 pm timeslot ever since.³⁸ Mr. Haines has hosted this primetime news and public affairs program since 1998.

In addition to "Kansas City Week in Review," KCPT(TV) produces "Ruckus," another weekly public affairs program that has aired since 1995, and local news specials to provide expanded treatment of issues that impact the Kansas City community.³⁹ KCPT(TV) also presents PBS news and public affairs programs such as "Frontline," "The Newshour with Jim Lehrer," "American Experience," "Washington Week in Review," "Wide Angle," and "Independent Lens."⁴⁰ PBS is a consistent leader in television's most prestigious competitions. In the 2007-2008 broadcast season, for instance, PBS won ten News and Documentary Emmy Awards – more than twice as many than any other network or cable television channel.⁴¹

³⁴ *Readers Digest Ass'n, Inc. v. F.E.C.*, 509 F.Supp. 1210, 1214-15 (D.S.D. NY) (interpreting the Act to require this two-step process not present in the statutory language) ("*Readers Digest*").

³⁵ *Readers Digest* at 1214-15.

³⁶ *Readers Digest* at 1214-15.

³⁷ *Readers Digest* at 1214-15.

³⁸ Declaration of Nick Haines.

³⁹ Declaration of Nick Haines. For example, KCPT(TV) has produced the following local news specials in recent months: "Foreclosed" (September 2008 in-depth treatment of rising home foreclosure rates in Kansas City), "Unequal Care" (October 2008 examination of healthcare disparities in Kansas City), and "Sewers: Kansas City's \$4 Billion Headache" (November 2008 chronicling of the city's crumbling infrastructure). *Id.*

⁴⁰ Declaration of Susan Stanton.

⁴¹ Declaration of Nick Haines.

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The Commission must find that KCPT acted within its legitimate press function in broadcasting the Kay Barnes Interview. In *Readers Digest*, the court provided an example of press entity communications that would not qualify for the press exemption: a partisan newspaper's paid propagandists denouncing the allegedly illegal acts of a candidate on street corners and on roaming sound trucks' loudspeakers "in a manner unrelated to the sale of its newspapers."⁴² The facts of KCPT's conduct could not be further from this example of an illegitimate press function.

The "distribution complained of" in Mr. Browning's Complaint, the Kay Barnes Interview, is a news story, commentary, or editorial. KCPT distributed the communication through its licensed facilities, on its licensed television channel, during a regularly-scheduled news program. The interviewer is a highly respected journalist, not an incognito propagandist. The Kay Barnes Interview aired for approximately 11 minutes.⁴³ Other news segments in this 30-minute broadcast incorporated roundtable discussions between Mr. Haines and two other Kansas City journalists regarding House, Senate, and Presidential election races; a teacher suspended for misconduct; the conviction of a child murderer; and local Kansas City real estate development controversies.⁴⁴ KCPT has attached a DVD of this "Kansas City Week in Review" news broadcast to this Response as Exhibit D. This Response dispels any possibility of finding that the Kay Barnes Interview lies outside KCPT's legitimate press function.

3) **The Complaint Fails To Support Its Novel Claim That A Traditional News Interview Constitutes a Candidate Debate**

The foregoing demonstration that the press exemption applies to KCPT's broadcast of the Kay Barnes Interview should end this matter. However, to resolve any conceivable doubt about this conclusion, KCPT points out that no factual assertion or legal claim provided by the Complaint is sufficient to overcome the Kay Barnes Interview's press exemption eligibility. The Complaint urges that KCPT "should not be allowed to recharacterize the program" as a news story, commentary, or editorial.⁴⁵ No recharacterization is necessary. "Kansas City Week in Review" and its Kay Barnes Interview segment are, by their inherent nature, protected news story, commentary, or editorial communications. The Complaint's novel demand to ignore the First Amendment's protection of press entities' political speech by recasting a news interview into something it is not must fail. To address the Complaint's attempt to re-write the First Amendment, the following discussion analyzes three specific aspects of the Complaint's allegations.

First, the Complaint cites no authority for the notion that a newspaper's or a candidate's second hand description of a news interview as a "debate" could possibly bind the Commission to subject the Kay Barnes Interview to the provisions of Sections 110.13 and 114.4(f) of the Commission's rules.

⁴² *Readers Digest* at 1214.

⁴³ Exhibit D at 1:15 to 12:30; *contra* Complaint at paragraph 19 (misstating Kay Barnes Interview duration as "exceed[ing] 20 minutes").

⁴⁴ Exhibit D.

⁴⁵ Complaint at paragraphs 14 – 16.

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Second, contrary to the Complaint's allegations, Mr. Haines did not describe the Kay Barnes Interview as a "debate." When introducing Ms. Barnes as a guest of the program, Mr. Haines used the term "debate" three times in the context of criticizing Representative Graves' refusal to participate in any televised debate during the election. These brief, editorial comments addressed candidates' actions in an election, criticizing an elected official's conduct, and thus fall within press exemption protection from government sanction. They did not suggest in any way, however, that the interview to follow constituted a candidate debate.

Finally, the Complaint's misleading characterization of the "Kansas City Week in Review" set as evidence of an attempt to substitute an "empty chair" for a debate-necessary second candidate is not only absurd,⁴⁶ but clearly insufficient to deem the Kay Barnes Interview as a debate. As the program's host, Mr. Haines sat behind a roughly triangular table that had places for two guests. Ms. Barnes sat in one of these seats, facing Mr. Haines. Only in the very beginning of the Kay Barnes Interview—for nine seconds, when panning in on host and guest—are the entire desk and third chair visible. The remainder of the 11-minute Kay Barnes Interview comprises only close-ups of host or guest, a "two shot" of both, and a full-screen 20-second video montage that ran during the opening moments of the program.

The reason this third chair was present becomes clear in the following news segments, when Mr. Haines and two other Kansas City journalists are all seated at the table to discuss a series of current events. The "Kansas City Week in Review" set had no podium, in-studio audience, separate moderator seating area, or other indicia of a debate. Neither Mr. Haines nor Ms. Barnes referenced, gestured towards, or even looked at the set's unused guest chair. To accept the Complaint's "empty chair" allegation would be absurd in the extreme – would the Commission deem a Barbara Walters interview that featured one candidate as guest and panned over an unused chair in the background an illegal "debate"? Must David Letterman find a smaller sofa?

4. Mr. Browning's Communications with KCPT Suggest a Grievance Unrelated to the Alleged Violation

Mr. Browning did not contact the station after his late July conversation with Ms. Stanton or receipt of Mr. Haines' subsequent voicemail and copy of the KCPT debate selection criteria. But on the day after the November 4 election, he called KCPT to request contact information for KCPT's registered agent for service of process. In a telephone conversation on November 5, 2008, Mr. Browning told Judith Ferguson, Executive Assistant to the KCPT Interim CEO and President, Ms. Stanton, that he was very unhappy with Ms. Stanton. He then announced, "the Libertarian Party is tired of being treated poorly and is going to start being mean," declaring, "we're not going to take this shit anymore" and "I want to tie [Mr. Haines] up to a flag pole and beat him bloody."⁴⁷

⁴⁶ Complaint at paragraph 11.

⁴⁷ Declaration of Judith Ferguson. According to one newspaper article, Mr. Browning appears bent on using the Commission as a club against a number of entities regarding alleged candidate debate violations during this past election, including the St. Joseph News-Press, the Northland Chamber, the St. Joseph Chamber, and Missouri Western. See *Libertarian Seeks Government Help; Browning Files Complaints with FEC*, ST. JOSEPH NEWS-PRESS (Sept. 27, 2008), attached hereto as Exhibit E.

CONCLUSION

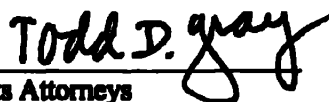
The Office of the General Counsel should not permit Mr. Browning to use the government's campaign finance regulations to beat Mr. Haines or KCPT "bloody" for misperceived violations. KCPT planned, but never aired, a candidate debate. Its actions before terminating these plans complied with the Act and the Commission's candidate debate rules. The actual broadcast communication Mr. Browning alleges is illegal clearly is protected from government restriction of political speech. KCPT(TV) is a respected noncommercial, educational television station and a valuable contributor to public discourse in the Kansas City community. Its determination to proceed with interviewing one candidate for the Missouri Sixth Congressional District during news programming, rather than producing its contemplated debate, represented a valid exercise of its good faith editorial judgment and served the public interest. For all of these reasons and as documented in this Response, we urge the Office of the General Counsel to close this matter forthwith, taking no further action against KCPT.

Although KCPT believes that it has demonstrated conclusively that its actions subject to this proceeding are consistent with the Act and the Commission's rules, please feel free to contact the undersigned should you have any questions or require additional information.

Respectfully submitted,

PUBLIC TELEVISION 19, INC.

By:


Its Attorneys
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Jeffrey J. Hunter
Dow Lohnes PLLC
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Washington, DC 20036-6802
(202) 776-2000

cc w/Encl.: Ms. Susan Stanton

EXHIBIT A

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Station Search Details

[FCC](#) > [Media Bureau](#) > [MB-CDBS](#) > [CDBS Public Access](#) > [Station Search](#)
[Help](#) [site map](#)

Station Search Details

Call Sign: KCPT
Facility Id: 53843
Community of License: KANSAS CITY, MO
Service: TV
Fac Type: EDUCATIONAL TV STATION
Status: LICENSED
Status Date: 05/10/2008
Frequency: 500
Channel: 19
Digital Status:
Lic Expir: 02/01/2014
Licensee: PUBLIC TELEVISION 19, INC.
Address: 125 EAST 31ST STREET
Address 2:
City: KANSAS CITY
State: MO
Zip Code: 64108 -
Phone Number:

Engineering Data [View Engineering Data](#)
Call Sign History [View Call Sign History](#)
FRN History [View FRN History](#)
Correspondence Folder [View Correspondence Folder](#)

Digital Television Information

DTV Call Sign: KCPT-DT
DTV Status: LICENSED
DTV Channel: 18

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29044250127

EXHIBIT E

29044250128

1 of 3 DOCUMENTS

St. Joseph News-Press (Missouri)

September 27, 2008 Saturday

Libert: seeks government help ; Browning files complaints with FEC

BYLINE: Anonymous

SECTION: LOCAL

LENGTH: 443 words

The Libertarian Party candidate for the U.S. 6th Congressional District has filed federal complaints for being excluded from three debates in Northwest Missouri, including one by the News-Press.

The Federal Election Commission and the U.S. Supreme Court have ruled against similar complaints, provided that the exclusion is based on the candidate's limited public interest and not on a platform or ideas, according to FEC records.

David Browning, of Oak Grove, is running against Republican incumbent Sam Graves and Democratic challenger Kay Barnes. Mr. Graves and Ms. Barnes are scheduled to participate in debates and forums organized by the News-Press, the St. Joseph Area Chamber of Commerce and the Northland Regional Chamber of Commerce, in Kansas City.

Mr. Browning's FEC complaints, received Thursday and Friday, allege the organizers are promoting certain candidates and didn't use appropriate "pre-established criteria" to select participants.

"Being in the debate shows people that we actually do have three parties and we have a chance," Mr. Browning said. "It's no longer a two-party game, and they keep wanting to play it that way."

The News-Press said it's reviewing the complaint and intends to comply legally while preserving the integrity of the debate format.

"By every measure -- financial support, popular support as measured through polling data, expenditures of money, time and effort -- Sam Graves and Kay Barnes have positioned themselves as the only viable candidates in the 6th District race," said News-Press executive editor Dennis Ellsworth.

Mr. Browning raised \$3,333 as of July, compared to \$1.9 million each by Mr. Graves and Ms. Barnes, according to the FEC. He received 4 percent support in a SurveyUSA/KCTV poll released Sept. 19, while Mr. Graves and Ms. Barnes received 51 and 42 percent, respectively.

By law, debate organizers must "use pre-established objective

criteria" to select candidates, but the FEC dismissed similar "low-rated matters" numerous times in 2000 and 2006, according to FEC records.

Mr. Browning said he's aware of the Supreme Court case but doubts the debates here had "pre-existing criteria."

"I know the standard by the News-Press is that I would distract from the other two candidates," Mr. Browning said. "That's my job."

The Northland Chamber declined comment while reviewing the issue. St. Joseph Chamber President Ted Allison couldn't be reached for comment.

The News-Press debate is scheduled for 7 p.m. Oct. 16 at Missouri Western State University.

Mr. Browning said he'll drop a complaint against Missouri Western, as it isn't organizing the debate.

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